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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537.

ARTHUR C. HARVEY COMPANY,
Petitioner,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
Former Collectors,
Respondents.

BRIEF FOR THE PETITIONER.

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ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

BRIEF FOR THE PETITIONER.

STATEMENT OF JURISDICTION.

This cause is before this Honorable Court on a writ of certiorari, granted by an order entered herein on January 9, 1933 (Rec. p. 100), to review a decision of the United States Circuit Court of Appeals for the First Circuit, affirming a judgment rendered against the plaintiff, petitioner herein, by the United States District Court for the District of Massachusetts.

The jurisdiction of this Court was invoked by a petition for a writ of certiorari, seasonably filed on December 3, 1933, as provided by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938; 28 U. S. C. A. § 347).

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (Rec. pp. 56–59) was rendered on October 31, 1931 and is reported in *52 Fed. (2) 885–886.*

The opinion of the Circuit Court of Appeals affirming the judgment of the District Court (Rec. pp. 63–70) was rendered on June 27, 1932, and is reported in *60 Fed. (2) 97–101.* A petition

for a rehearing (Rec. pp. 71–76) was seasonably filed and was denied by an order of that Court on August 5, 1932 (Rec. p. 88).

A supplemental written opinion (Rec. pp. 85–87), denying *The Appellant's Motion To Be Heard In Oral Argument* (Rec. pp. 88–99), was rendered by the Circuit Court of Appeals on October 11, 1932 and is reported in *61 Fed. (2) 365.*

SUMMARY OF THE CASE.

1. The petitioner, on March 14, 1919, having always kept its books of account on the basis of a *fiscal year* ending June 30th, filed an original return pursuant to Section 212 (b) of the Revenue Act of 1918 (40 Stat. 1064; p. 38, *infra*), upon which the reported income was not properly adjusted with the income reported on its return for the calendar year 1917; and, thereafter, seasonably filed *amended returns upon which it reported income for the entire fiscal year ending June 30, 1918 and computed its taxes for the six-months period ending June 30, 1918, by taking six-twelfths of the tax computed upon the income for the entire fiscal year,* in accordance with Section 205 (a) of the 1918 Act (40 Stat. 1061; p. 38, *infra*).

2. On the basis of *the original return*, taxes amounting to $302,524.65 (Rec. p. 31) were assessed, of which the petitioner paid $227,063.28 to the defendant Malley (Rec. p. 54), in three installments, of which the first amounting to $60,000 was paid on March 19, 1919; the second amounting to $94,466.78 was paid on July 1, 1919; and the third amounting to $72,596.50 was paid on September 17, 1919.

3. On April 10, 1923 the petitioner filed a timely claim for refund of $107,826.61 of the taxes it had paid for the six months period in 1918, which also requested that $48,563.39 of the asserted overpayment for 1918 should be credited to taxes tentatively determined for the years 1915, 1916 and 1917 (Rec. pp. 47–49).

4. The Commissioner of Internal Revenue examined and considered the returns and claims thus filed and thereupon (1) *accepted and approved the amended return,* (2) determined the original assessment to be excessive in the amount of $156,340.83, (3) abated the $75,461.39 of the assessment which had

not been paid, and (4) *officially allowed the petitioner's claim for overpayment in the amount of $80,879.44*, all of which is clearly shown in the record by the following documents:

(1) The Commissioner's final letter of determination dated May 7, 1923 (Rec. p. 23);

(2) The Schedule of Overassessment approved by the Commissioner on December 20, 1923 (Rec. p. 37);

(3) The Schedule of Refunds and Credits approved by the Commissioner on February 18, 1924 (Rec. p, 37); and

(4) The Certificate of Overassessment, No. 29,852, issued to the petitioner by the Commissioner on May 16, 1924 (Rec. p. 31).

5. Thereupon the defendant Nichols, as Collector of Internal Revenue, acting under instructions from the Commissioner (Rec. p. 37), credited and applied $74,648.39 of the allowed overpayment of $80,879.44 to alleged underpayments of the petitioner's taxes for the years 1915, 1916 and 1917, after the expiration of the five-year period of limitation for the assessment and collection of any such taxes for those years, as provided in Section 250 (d) of the Revenue Act of 1921 (42 Stat. 265; p. 39, *infra*).

6. On July 27, 1929, the petitioner filed a petition with the Commissioner of Internal Revenue (Rec. p. 41) setting forth that the $74,648.39, as previously allowed, should be refunded (1) since a sufficient claim therefor had been seasonably filed on April 10, 1923 (Rec. p. 39), and (2) since the credit of said sum to alleged taxes for the years 1915, 1916 and 1917 was *"void" under the provisions of Section 609 of the Revenue Act of 1928 (45 Stat. 875; 26 U. S. C. A. § 2609;* p. 41, *infra*).

7. By a letter dated December 17, 1929 (Rec. pp. 49–50), the Commissioner of Internal Revenue refused to refund the $74,648.39 on the ground that (1) his previous determination, which had been made under Section 205 (a) of the Revenue Act of 1918 (40 Stat. p. 1061; p. 38, *infra*), and his allowance of the $80,879.44 overpayment, *were erroneous*, and (2) the proper method of computing the petitioner's taxes for the six-months period "is in accordance with Section 226 of the Revenue Act of 1918" (40 Stat. 1075; p. 39, *infra*).

8. This suit was brought by a writ dated January 25, 1930 (Rec. p. 1) to recover the sum of $74,648.39, with interest, which was within two years of the Commissioner's letter of disallowance dated December 17, 1929, as provided in Section 3226 of the United States Revised Statutes (26 U. S. C. A. § 156).

9. The petitioner, plaintiff-appellant below, seeks recovery of the said sum ($74,648.39) either (1) as *1918 taxes wrongfully collected and credited*, as alleged in Count I of the plaintiff's declaration (Rec. pp. 3–8), or, (2) as *"money had and received" by the defendant* Malley, as alleged in Count II of the plaintiff's declaration (Rec. p. 8).

10. The defendants answered separately by way of general denials (Rec. pp. 9–10) setting forth no special defenses (1) as to the jurisdiction of the District Court, (2) as to any statute of limitations, (3) as to any failure of the plaintiff to comply with the statutes and regulations in regard to filing sufficient claim for refund, or (4) as to any matters alleged in the plaintiff's declaration.

11. The District Court, *in the course of the trial*, ruled that the plaintiff had made out a prima facie case on the basis of the Certificate of Overassessment and the other documents showing the overpayment, which counsel for the Government admitted in open court to be valid documents (Rec. p. 16); but in its written opinion the District Court decided the whole case *"on a question which was not discussed at the hearing or noticed in the briefs"* (Rec. p. 82), and held (Rec. p. 59) as follows:

> "In the case before the court no refund could be made to the plaintiff because no claim has ever been filed for a refund of the taxes for the years 1915, 1916 or 1917. As no refund could be made, the credit is not void."

12. The opinion of the Circuit Court of Appeals entirely disregards (1) *the fact that the District Court found and ruled that the petitioner had actually overpaid its 1918 taxes* and (2) all of the documents mentioned in paragraph 4 above, which were admitted, in open court, to be valid and which conclusively show the Commissioner's official determination of the overpayment; and in its opinion (Rec. p. 70) that Court holds as follows:

"Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39, so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant has not sustained in this case."

. . . . . .

"In other words, there was no overassessment, and therefore the refunding of that part of the alleged overassessment which was on the books of the collector applied to prior tax liabilities was denied, because no such overassessment and overpayment occurred."

STATUTES INVOLVED.

The statutes involved, the pertinent parts of which are set forth in the appendix (pp. 38–42, *infra*), are as follows:

Revenue Act of 1918.

Section 212 (b), 40 Stat. p. 1064.
Section 205 (a), 40 Stat. p. 1061.
Section 226, 40 Stat. p. 1075.

Revenue Act of 1921.

Section 250 (d), 42 Stat. p. 265.
Section 1313, 42 Stat. p. 313.

Revenue Act of 1928.

Section 609, 45 Stat. 875; 26 U. S. C. A. § 2609,

United States Revised Statutes.

Section 629 (4), 36 Stat. 1092; 28 U. S. C. A. § 41 (5).
Section 3226, as amended, 44 Stat. 116; 26 U. S. C. A. § 156.
Section 3228, as amended, 45 Stat. 878; 26 U. S. C. A. § 157.

SPECIFICATION OF ERRORS.

The manifold errors in the courts below have been specified or assigned in the petition for certiorari (pp. 10–12), and are here omitted in the interest of brevity because in its ultimate analysis the whole case, on its merits, seems to present only three fundamental questions for the decision of this Honorable Court, to wit:

THE QUESTIONS PRESENTED.

First: **Whether the petitioner actually made the overpayment of its 1918 taxes and sustained the burden of so proving.**

Second: **Whether the plaintiff is precluded from recovery by reason of the fact that its claim for refund of April 10, 1923 contained a request that a portion of the claimed overpayment should be credited to taxes for the years 1915, 1916, and 1917.**

Third: **Whether the plaintiff, petitioner herein, has a good cause of action against the defendant Malley, either (1) for refund of 1918 taxes or (2) for money had and received.**

SUMMARY OF ARGUMENT.

I. Upon this record the plaintiff fully sustained the burden of proving that it actually made an overpayment of its taxes for the six months period ended June 30, 1918.

1. The documentary evidence, the admissions of Government Counsel in open court and the finding of fact in that regard by the District Court, conclusively prove the overpayment.

2. The correct computation of the petitioner's taxes either under Section 205 (a) or Section 226 of the 1918 Act results in a tax liability, for the six months period, of only $146,098, as against $227,063.28 actually paid.

3. The Commissioner did not in fact, nor did he as a matter of law, have "a right to", in 1929, redetermine the 1918 tax.

II. The plaintiff is not precluded from recovery by reason of the fact that its claim for refund of April 10, 1923 requested that a portion of the asserted overpayment should be credited to taxes for the years 1915, 1916 and 1917.

1. As a matter of law the claim for credit of the $48,563.39 is not binding upon the petitioner.

2. As a matter of equity the claim for credit of the $48,563.39 is ineffectual to create an estoppel.

III. The plaintiff, petitioner herein, has a good cause of action against the defendant Malley, and the suit was properly and seasonably brought.

1. A good and seasonable cause of action lies against the defendant Malley under Count 1 of the plaintiff's declaration for 1918 taxes wrongfully collected.

2. A good and seasonable cause of action lies against the defendant Malley for "money had and received" under Count II of the plaintiff's declaration.

3. The Government's objections (1) that the suit was not seasonably brought and (2) that the District Court did not have jurisdiction are untenable.

ARGUMENT.

I.

UPON THIS RECORD THE PLAINTIFF FULLY SUSTAINED THE BURDEN OF PROVING THAT IT ACTUALLY MADE AN OVERPAYMENT OF ITS TAXES FOR THE SIX MONTHS PERIOD ENDED JUNE 30, 1918.

In support of the above contention the petitioner respectfully submits to this Honorable Court the following:

1. The documentary evidence, the admissions of Government Counsel, and the finding of fact in that regard by the District Court, conclusively prove the overpayment.

In passing upon the question of whether or not the petitioner actually overpaid its 1918 taxes the attention of this Honorable Court is respectfully invited to the following documentary evidence in the record all of which conclusively shows that the

Circuit Court of Appeals erred in holding that there had been no overassessment or overpayment of the petitioner's taxes for the six months period:

1. The letter of May 7, 1923 (Rec. p. 23), the only official statutory determination of the petitioner's taxes for the six months period that the Commissioner has ever made, which conclusively shows that the original assessment of $302,524.65 was erroneous and excessive in the amount of $156,340.83;

2. The Schedule of Overassessment (Rec. p. 37), dated December 20, 1923, on which the Commissioner confirmed the overassessment of $156,340.83 and officially allowed the abatement of $75,461.39 thereof which had not been paid;

3. The Schedule of Refunds and Credits (Rec. p. 37), approved and signed February 18, 1924, which shows that the Commissioner officially allowed the petitioner an overpayment of its taxes for the six months period in the amount of $80,879.44; and

4. The official Certificate of Overassessment No. 29,852 (Rec. p. 31) which shows the overassessment of $156,340.83 and which was issued to the petitioner on May 16, 1924 (Rec. p. 55).

The Commissioner's letter of May 7, 1923 was presented in evidence as plaintiff's exhibit, while the Certificate of Overassessment and the two schedules above referred to were, as stated above, admitted in open Court by counsel for the Government to be valid documents (Rec. p. 16) and offered in evidence as defendant's exhibits. In addition to the documents themselves, the District Court found and ruled that the plaintiff had made out a "prima facie case", or in other words that the Certificate of Overassessment and the other documents sufficiently established the fact of the overpayment (Rec. p. 16).

It is obvious that the whole opinion of the District Court is predicated *upon the finding of fact that the petitioner had actually overpaid its 1918 taxes*, while that of the Circuit Court of Appeals is predicated entirely *upon the holding that the petitioner did not make such overpayment.*

It is a universal rule with few exceptions that Courts of Re-

view will consider only those questions which have been presented and ruled upon by the lower Court and that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the lower Court.

San Juan Light & Tr. Co. v. *Requena*, 224 U. S. 89; 32 S. Ct. 399.
Tucker v. *Alexander*, 275 U. S. 228; 48 S. Ct. 45.
United States v. *Mitchell*, 271 U. S. 9; 46 S. Ct. 418.

In the case of *San Juan Light and Transit Company, supra*, Mr. Justice Van Devanter said:

> "Each party, without objection from the other, introduced evidence bearing upon that question; and . . . there was no exception. . . . Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

It is respectfully submitted that the fact of the overpayment, so clearly found by the District Court upon sufficient evidence (p. 8 *supra*), was binding upon the Circuit Court of Appeals and that it was limited to the question of law decided and passed upon by the District Court.

2. The Correct Computation of the Petitioner's Taxes either under Section 205 (a) or Section 226 of the 1918 Act Results in a Tax Liability, for the Six Months Period, of only $146,098 as against $227,063.28 actually paid.

As pointed out in the opinion of the Circuit Court of Appeals (Rec. p. 69), the Commissioner's final determination of the petitioner's taxes for the six-months period, as shown in his letter of May 7, 1923 (Rec. p. 23), was made under Section 205 (a) of the Revenue Act of 1918 (40 Stat. p. 1061; p. 38, *infra*), while in the letter of disallowance dated December 17, 1929 (Rec. p. 49) the Commissioner states that the previous determination and allowance of the overpayment were erroneous and that the computation should be made under Section 226 of the 1918 Act (40 Stat. p. 1075; p. 39, *infra*). No such *computation*

of the taxes, under Section 226, if made by the Commissioner, is presented anywhere in this record. Nor is the petitioner's original return shown in the record.

As a matter of arithmetic it is entirely immaterial whether the petitioner's taxes for the six-months period ended June 30, 1918 be computed under Section 205 (a) or under Section 226 of the Act of 1918. Either computation, correctly made, conclusively shows that the original assessment of $302,524.65 was excessive in the amount of $156,340.83 and *that the petitioner's true tax liability for the period is only $146,098 as against $227,063.26 actually paid.*

We respectfully submit that the purpose or intent of Congress as embodied in the two sections is this:

1. Section 205 (a) prescribes the method to be followed by a corporation, which at that time had an established fiscal method of accounting which it did not wish to change, in making the transition by its *first return* under the 1918 Act, from the *calendar method* of reporting income to *the fiscal method,* as required by Section 212 (b) of the 1918 Act. 2. Section 226 prescribes the method to be followed, at any time, either by an individual or a corporation, where the taxpayer *changes his or its method of accounting, either from a calendar year basis or from a fiscal year basis, with the permission of the Commissioner,* in making the transition, of reporting income, from his or its old method to the new.

House Report No. 767; 65th Congress, Second Session; pp. 4, 14.

Senate Document No. 391; 65th Congress, Second Session, p. 3.

American Hide and Leather Co. v. *United States,* 284 U. S. 343; 52 S. Ct. 154.

Appeal of Henry D. Weed, 2 B. T. A. 84.

Appeal of Coghlin Electric Company, 3 B. T. A. 1071.

Congress of course recognized that if a corporation with an established fiscal method of accounting which it did not wish to change made its first return in strict compliance with Section 212 (b) of the 1918 Act and returned its gross income and deductions for the entire fiscal year, the return would overlap

and include a portion of the income already reported on its calendar year return and would thus result in a double tax on his first return under the 1918 Act.

House Report No. 767, supra, at page 14, contains the following comment on Section 212 (b) of the Act:

> "Under the present law corporations having a fiscal year are required to make return on the 1st day of the third month following the close of the fiscal year."

House Report No. 767, supra, at page 4, contains the following comment on Section 226 of the Act:

> "If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the prosions of Section 226".

Senate Document No. 391, supra, at page 3, contains the following comment on Section 205 of the Act:

> "Section 205 provides the method of determining the tax where parts of the fiscal year of the taxpayer are taxable at different rates. Under the old law the income was prorated and the rates for the different years were then applied. Under the new law the tax is computed separately for the full year under the rates for both years and then the tax is prorated. The new law allows the individual income taxpayer the privilege of selecting any fiscal year as his taxable year. Heretofore he had no option; his taxable year was the calendar year."

In the American Hide and Leather Company case, *supra,* this Court held that the taxpayer was not bound by its erroneous return and prescribed the method of computing its taxes for a six months period under Section 226 of the 1918 Act. Mr. Justice Stone, who delivered the opinion of the Court, said:

> "Section 226 of the 1918 Act authorizes the calculation of the tax for that part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal

year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed*, 2 B. T. A. 84."

As to the two appeals cited above we respectfully submit that the Board of Tax Appeals holds thus: A taxpayer with a *fiscal method of accounting*, which it did not wish to change, was authorized to make the transition from the calendar year basis of *reporting income*, as the earlier statute required, to the fiscal year basis, as Section 212 (b) of the 1918 Act (p. 38, *infra*) required, in either of two ways which the Commissioner did not have authority to change: 1. If the taxpayer *made a return* for the fractional portion of its fiscal year falling in 1918 it was authorized to compute its taxes for that period under Section 226 of the 1918 Act (p. 39, *infra*), whether the income reported *on that return* was (1) its *actual income* during the months involved, or (2) the *proportionate part of net income for the entire fiscal year*. 2. If the taxpayer made a return of the income for its *entire fiscal year* beginning in 1917 and ending in 1918, it was *required* to compute its taxes for the fractional period under Section 205 (a) of the 1918 Act by taking that proportion of the total tax computed on the net income for the entire fiscal year which the fractional period falling in 1918 bore to the entire fiscal year.

In the case at bar, both in its *erroneous original return* and in its corrected or amended returns which the Commissioner accepted and approved (Rec. p. 26), the petitioner adopted the latter method. It did not make a return for the six months period. Both of the taxpayers, in the appeals cited above, *adopted the former method*, or made a *separate return* for the fractional period, which the Board held the Commissioner had no authority to change.

In the Appeal of Henry D. Weed, *supra*, the Board found (1) and ruled (2) as follows:

> (1) "5. In his return for the five months' period ended May 31, 1918, the taxpayer reported five-twelfths of his net income for his fiscal period ended May 31, 1918."
>
> . . . . . .

(2) "The Commissioner holds that section 205 (a) of the taxing statute applies to the instant taxpayer. We do not think that the section has application *since it applies to the case of a taxpayer making a return for a fiscal year beginning in 1917 and ending in 1918.* This taxpayer did not make a return for the fiscal year beginning in 1917 and ending in 1918. He had made a return of his income to December 31, 1917, inclusive, and had paid the taxes imposed by prior taxing acts upon that income." (Italics supplied.)

In direct conflict, we submit, with the decision of this Court in the American Hide and Leather Company case, and with the decisions of the Board of Tax Appeals, *supra*, the Circuit Court of Appeals in its opinion (Rec. pp. 86–87) said:

"*But the question of how the tax should be computed under Sec. 226 was not in issue in the American Hide and Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this court, since it is not only contrary to the language of the statute, but would produce inequitable results.*

To illustrate: Let us assume that the plaintiff corporation had a taxable income during the period from June 30, 1917, to January 1, 1918, of $50,000, on which, since it made its return for the year 1917 on the basis of the calendar year, it had already paid a tax under the 1916 Act, and from December 31, 1917, to July 1, 1918, its taxable income was $150,000. Applying the theory of the plaintiff's counsel, it would in such case be taxed on an income of only $100,000 during the period from December 31, 1917, to July 1, 1918, although its taxable income during that period was $150,000. In other words, under such an interpretation of Sec. 226 it would escape taxation on $50,000.

To state the converse of this: Assuming that its taxable income during the last half of the calendar year of 1917 was $150,000, and for the first half of 1918 was only $50,000, the taxpayer under the 1916 Act, making a return for the calendar year of 1917, would have already paid a tax on $150,000 of income; yet, according to the theory of

counsel for the plaintiff, its return for the period of the fiscal year falling in 1918 should show a taxable income of $100,000, and as a result he would not only pay a tax on the $50,000 actually earned in the period of the fiscal year falling in 1918, but a double tax on $50,000 more earned in 1917.

Nothing more is needed to show that such could not have been the intent of Congress, when it said in Sec. 226 that, if a change were made from a calendar year to a fiscal year, 'a separate return should be made for the period between the close of the last calendar year for which a return was made and the date designated as the close of the fiscal year'." (Italics supplied.)

The petitioner, in the case at bar, *has never changed its method of accounting*, which is the *change* contemplated in the statute. It has always kept its books of account on the basis of a fiscal year ending June 30th. It only *changed* its method of reporting income, as it was required to do by Section 212 (b) of the Act of 1918 (40 Stat. 1064; p. 38, *infra*).

Petitioner's net income for the entire fiscal year ended June 30, 1918 as determined by the Commissioner was $495,390.40 (Rec. p. 25). Six-twelfths or one-half of that sum amounts to only $247,695.20, which your petitioner respectfully submits was its true and correct statutory net income for the six months' period whether its taxes be computed under Section 205 (a) or under Section 226 of the 1918 Act. It is inconceivable that an assessment of $302,524.65 can properly be made on a statutory net income of only $247,695.20. Obviously, therefore, the Circuit Court of Appeals was clearly in error (Rec. p. 70) in holding that:

> "In other words, there was no overassessment, and therefore the refunding of that part of the alleged overassessment which was on the books of the collector applied to prior tax liabilities was denied, because no such overassessment and overpayment occurred."

Furthermore, there are no figures in this entire record upon which any such computation of the taxes under Section 226 of the Act can be made, in accordance with the method as above

prescribed by the Circuit Court of Appeals; on the other hand, there are sufficient figures in the record to compute the petitioner's taxes for the six months period either under Section 205 (a) of the Act, as the Commissioner did in 1923 (Rec. pp. 23–26) or, in accordance with the method of computation, under Section 226 of the Act, as prescribed both by this Court and the Board of Tax Appeals in the cases above cited. In the Commissioner's letter of May 7, 1923 (Rec. pp. 23–26), the petitioner's net income for the entire fiscal year, as finally determined by the Commissioner, amounts to $495,390.40 (Rec. p. 25). The petitioner admits that this figure is correct. One-half of this sum, therefore, is the only figure necessary properly to compute the taxes for the six months period under Section 226.

It is respectfully submitted, therefore, that the computation of the petitioner's taxes under Section 205 (a) of the Act showing its true tax liability, for the six-months period ended June 30, 1918 to be $146,098, was correct and proper, as alleged in paragraghs 8 and 9 of the plaintiff's declaration (Rec. pp. 4, 5) and as evidenced by the Commissioner's letter of May 7, 1923 (Rec. p. 23), and the Certificate of Overassessment (Rec. p. 31) which counsel for the Government admitted in open Court at the trial to be a valid document.

3. The Commissioner did not in fact, nor did he, as a matter of law, have "a right to", in 1929, redetermine the 1918 tax.

The opinion of the Circuit Court of Appeals (Rec. p. 69) states:

> "The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917, to July 1st, 1918, which he had a right to do, though he could not collect any additional tax, *Lewis* v. *Reynolds*, *supra*, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39 was erroneous, the former computation having been based on Section 205 of the 1918 Act."

The above comments seem to be based entirely upon the

Commissioner's letter of December 17, 1929 (Rec. p. 50). The petitioner respectfully submits that the letter of December 17, 1929 was neither in fact nor in law such a "redetermination" of the tax as the statute requires. Usually a bona fide determination of a tax by the Commissioner of Internal Revenue sets forth the detailed figures in the form of the Commissioner's letter of May 7, 1923 (Rec. p. 23).

An examination of the Certificate of Overassessment (Rec. p. 31) will show that the Commissioner's office again indicated its approval of the refund of $74,648.39 to the plaintiff on September 28, 1929, but that this action was cancelled by the General Counsel on December 9, 1929. At that time, however, neither the General Counsel nor any other administrative officer *had the right*, under the applicable statutes, to review the Commissioner's allowance.

Section 1313 of the Revenue Act of 1921 (42 Stat. 313; p. 40, *infra*), which was in force at the time the Commissioner made his only official determination of the tax on May 7, 1923, provides as follows:

"Administrative Review."

> "Sec. 1313. That in absence of fraud or mistake in mathematical calculation, the findings of fact in and the decision of the Commissioner upon (or in case the Secretary is authorized to approve the same, then and after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States."

The letter of December 17, 1929, was nothing more or less than an attempt on the part of the General Counsel's office to avoid the obvious effect, upon the erroneous credits, of Section 609 of the 1928 Act (p. 41, *infra*). However, when the suit came to trial the defense put in evidence the Certificate of Overassessment to sustain the contention that the plaintiff was suing on an "allowed claim" and was limited to a suit against the United States in the Court of Claims. It is self-evident that if the Commissioner's supposed redetermination in 1929 is sound in law and true in fact, then neither the Certificate of Overassess-

ment (Rec. p. 31), the Schedule of Overassessment (Rec. p. 37), nor the Schedule of Refunds and Credits (Rec. p. 37) are valid documents.

Nor could the Commissioner himself, in 1929, redetermine your petitioner's 1918 taxes, because more than five years had expired, after the return for that year had been filed, as provided in Section 250 (d) of the Revenue Act of 1921 (45 Stat. 265; p. 39, *infra*), to wit:

> "The amount of income, excess-profits, or war-profits taxes due under any return made under this Act—and the amount of any such taxes due—under prior income, excess-profits or war profits tax Acts—*shall be determined* and assessed *within five years after the return was filed*, unless the Commissioner and the taxpayer consent in writing to a *later determination, assessment and collection of the tax.*" (Italics supplied.)

There is no evidence that the petitioner and the Commissioner of Internal Revenue ever signed any waiver or agreement that any determination or redetermination of the petitioner's 1918 taxes might be made more than five years from the time the return was filed.

But, assuming that the Commissioner did make a redetermination of the 1918 taxes in 1929, *which this record does not disclose*, the account for 1918 had then been closed, on the basis that the petitioner's total tax liability for that year was only $146,098. The Commissioner could not, in 1929, reopen the account without *creating a new liability on account of* 1918 taxes by making a new assessment. But any such new assessment would be in direct violation of Section 250 (d) of the Revenue Act of 1921, *supra*. Nor could the Commissioner, in 1929, even if such liability existed, credit back or reapply, to the 1918 account, the $74,648.39 which then stood on the collector's books as, and occupied the status of, a sum collected or paid on account of taxes for the years 1915, 1916 and 1917; because that recredit and reapplication would be in violation of Section 609 of the Revenue Act of 1928 (p. 41, *infra*). Stated in terms of its ultimate effects, the opinion of the Circuit Court of Appeals holds that in 1929 the Commissioner had a right *to redetermine*,

recreate, and reassess a liability for the year 1918, and to collect a tax thereon, by way of a credit, *which liability,* by his Certificate of Overassessment issued in 1924, *the Commissioner himself had officially and finally declared did not exist.*

The petitioner respectfully submits that the opinion of this Court in the case of *Lewis* v. *Reynolds, 284 U. S. 281, 51 S. Ct. 145,* cited in the opinion of the Circuit Court of Appeals, does not support its above holding.

As a matter of law, therefore, the petitioner respectfully submits that the Circuit Court of Appeals was clearly in error in holding that the Commissioner "had a right", in 1929, to "redetermine" the taxes for the six months period ending June 30, 1918, and to deny "the refunding of that part of the alleged overassessment which was on the books of the Collector applied to prior tax liabilities".

The petitioner respectfully submits, therefore, (1) that it sufficiently sustained the burden of proving that it actually overpaid its taxes for the six-months period ended June 30, 1918, (2) that the Circuit Court of Appeals erred in all of its comments and holdings to the contrary.

II.

THE PETITIONER IS NOT PRECLUDED FROM RECOVERY BY REASON OF THE FACT THAT ITS CLAIM FOR REFUND OF APRIL 10, 1923 REQUESTED THAT A PORTION OF THE OVERPAYMENT SHOULD BE CREDITED TO TAXES FOR THE YEARS 1915, 1916 AND 1917.

The petitioner's claim of April 10, 1923, in which it requested refund of $107,826.61 (Rec. p. 49), also requested that $48,563.39 of the overpayment should be credited to additional taxes for the years 1915, 1916 and 1917, *which had merely been proposed for assessment* (Rec. p. 48). At that time, however, the statute of limitations had already run against the assessment and collection of any taxes for the years 1915, 1916 and 1917, as provided in Section 250 (d) of the Revenue Act of 1921 (42 Stat. 264: p. 39, *infra*), since it was then more than *"five years* after the date when" the returns for all of those years had been filed (Rec. p. 54).

The fact that the plaintiff had thus requested that a portion

of the 1918 overpayment be credited to taxes for the earlier years was not set forth as a special defense in the defendants' answers or referred to in the briefs or oral arguments in either of the Courts below. Both opinions below comment on this fact and seem to raise some questions as to the legal or equitable effects of the claim for the credit, as against the petitioner; thus it may be urged by the Government that the claim for credit operates as an estoppel and precludes the plaintiff from objecting to the wrongful credit of the $74,648.39 to taxes for the earlier years.

1. As a matter of law the claim for credit of the $48,563.39 is not binding on the petitioner.

In support of this contention the petitioner respectfully submits the following:

(1) The request for credit was made after the period of limitations for the assessment and collection of any taxes for the years 1915, 1916 and 1917 had already expired, as provided in Section 250 (d) of the Revenue Act of 1921 (p. 38, *infra*).

(2) Obviously the request for credit of $48,563.39 to the earlier years was based upon the petitioner's adjustment of the 1918 with the 1917 taxes resulting in an overpayment of $107,826.61 for the six months period ended June 30, 1918, whereas the Commissioner's adjustment resulted in an overpayment of only $80,879.44 of which, without notice or opportunity to be heard, he credited $74,648.39 to the earlier years.

(3) There is no evidence in the entire record to show that the Commissioner of Internal Revenue *at any time made a determination* of the plaintiff's taxes for the years 1915, 1916 and 1917 or to show that the petitioner at any time actually owed $74,648.39 additional taxes for those years.

(4) The Commissioner's letter of final determination for the years 1915, 1916 and 1917, showing the $74,648.39 to be due, *is not shown in this record, if any such letter was ever issued*, and there is no other evidence in the record which shows that the Commissioner actually made the assessment of the $74,648.39, or that he at any time made

demand or gave notice that such additional taxes had been determined and would be assessed and collected.

(5) There is no evidence in the record which shows that the petitioner and the Commissioner *at any time signed a waiver with regard to the assessment and collection of any additional taxes for the years 1915, 1916 and 1917, or that the petitioner ever gave a bond or in any way extended* the five year period of limitation for the assessment and collection of such taxes.

(6) There is no evidence in the record which shows that the petitioner at any time was granted the right to be heard or make any protest in regard to any assessment and collection of the $74,648.39 additional taxes for the years 1915, 1916 and 1917, before the credit thereof was made.

(7) There is no evidence in the record which shows that the petitioner at any time filed any claim for abatement of any taxes assessed or demanded for the years 1915, 1916 and 1917 or that the collection of any of its taxes for those years "was stayed" within the meaning of Section 611 of the Act of 1928 (26 U. S. C. A. § 2611).

Furthermore, the petitioner begs to explain to this Honorable Court that the foregoing statements as to "what evidence is not in the record" are not purely *technical.* At the trial in the District Court, the plaintiff was *ready, able and willing to show by competent evidence* that the Commissioner of Internal Revenue never gave notice of any assessment of the $74,648.39, and advised the petitioner as to just how the $74,648.39 had been calculated and determined, or granted the petitioner an opportunity to be heard or make protest against the assessment and collection thereof. But no question requiring the plaintiff to present such evidence was raised at the trial. If the District Court had not, at the very beginning of the trial, *ruled that the plaintiff had made out a prima facie case,* by reason of the Certificate of Overassessment and the admission of Counsel for the Government that the credits had been made after the statute had run (Rec. p. 16), the petitioner would have introduced competent evidence to establish all of these contentions beyond dispute.

It is respectfully submitted that, even though the claim for credit of $48,563.39 on April 10, 1923 was made after the statute of limitations had run, nevertheless the Commissioner was required under the applicable statutes, as well as a matter of equity, to give the *required notice* and grant the petitioner the right to be heard, before a credit or collection of $74,648.39 could be made.

> *Lipke* v. *Lederer*, 259 U. S. 557, 562; 42 S. Ct. 549, 551.
> *Turner* v. *Wade*, 254 U. S. 64; 41 S. Ct. 27.

In the case of *Lipke* v. *Lederer, supra*, this Court expressly holds that the constitutional guarantee of due process of law requires that, under a Federal Taxing Statute, the taxpayer must be given notice and an opportunity to be heard before the tax becomes irrevocably fixed and payable. Mr. Justice McReynolds, who delivered the opinion of the Court, said:

> "Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced, the taxpayer must be given fair opportunity for a hearing; this is essential to due process of law. *Central of Ga. Ry.* v. *Wright*, 207 U. S. 127, 136, 138, 142; 28 Sup. Ct. 47; 52 L. Ed. 134; 12 Ann. Cas. 463."

The case of *Turner* v. *Wade, supra*, is to the same effect. In that case Mr. Justice Day, who delivered the opinion, said:

> ". . . due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 U. S. 385, and previous cases in this court cited on page 386, 28 Sup. Ct. 708; 52 L. Ed. 1103. See also *Coe* v. *Fertilizer Co.*, 237 U. S. 413, 425; 35 Sup. Ct. 625; 59 L. Ed. 907."

As a matter of law, therefore, it is respectfully submitted that the claim for credit is not binding on the petitioner.

2. As a matter of equity the claim for credit of the $48,563.39 is ineffectual to create an estoppel.

It would be entirely unnecessary in this connection to cite the numerous cases in which this Court has expounded the doctrine of equitable estoppel in its various forms. "The doctrine of estoppel by conduct has been applied under a great variety of circumstances."

> *Leather Mf'rs' Nat. Bank* v. *Morgan*, 117 U. S. 96; 6 S. Ct. 657, 663.

In the above case Mr. Justice Harlan said:

> "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth,—which he has the means, by ordinary diligence, of ascertaining,—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the Supreme Court of Ohio in *Ellis* v. *Ohio Life Ins. & T. Co.*, 4 Ohio St. 667, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard for the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of iis rules and remedies to the enforcement of this duty. . . .'"

Applying the rule of equitable estoppel as thus expounded by Mr. Justice Harlan to the case at bar, it is respectfully submitted that the defendant in this case is precluded from asserting

the estoppel by reason of the fact that when the Commissioner accepted the claim for credit he must have known that no tax liability in regard to the 1915, 1916 and 1917 taxes existed at that time. Also, by reason of his failure to comply with the statute, give notice and the opportunity of a hearing before the supposed tax liability became "irrevocably" fixed.

In a case, not yet reported, decided by the United States Court of Claims on January 9, 1933, that Court held that the taxpayer was estopped from recovery of an overpayment credited to outlawed taxes because it had filed a claim for credit therefor.

> *Naumkeag Steam Cotton Co.* v. *United States*, Ct. Cls. No. L-327. (See Prentice-Hall Tax Service, 1933, Rep. No. 8, Par. 564; pp. 602–630.)

The above case, however, is clearly distinguishable from the case at bar. In that case the claim for credit was made before the period of limitation as to the outlawed years had expired and after the taxes had been assessed and demanded and the taxpayer had been given full opportunity to be heard in protest. The collector was, in that case, in a position to make the collection by distraint or otherwise. None of these circumstances exist in the case at bar.

In connection with the *Naumkeag Steam Cotton Co. case*, the attention of this Court is respectfully invited to a consideration of the able dissenting opinion rendered by Judge Littleton of the Court of Claims where the various regulations and rulings of the department in regard to claims for credit are referred to and commented upon. In the course of the dissenting opinion, Judge Littleton (Prentice-Hall, *supra*, pp. 617, 627) said:

> The long-continued practice of the department with respect to claims for credit should be taken into consideration. *Brewster* v. *Gage*, 280 U. S. 327, 336, 50 S. Ct. 115, 74 L. Ed. 457 (8 Am. Fed. Tax Rep. 10263). *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 51 S. Ct. 144 (9 Am. Fed. Tax Rep. 597).
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> . . . . . .
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> *In order to render the rule of estoppel operative it is essential that the party against whom the estoppel is claimed should have acted with knowledge of his rights and have*

been aware of the facts in respect of the estoppel claimed; also, that the party invoking the estoppel was misled by the acts of conduct of the party against whom the estoppel is claimed; that he changed his position in reliance thereon, and was justified in so doing; and that he was prejudiced thereby, or the party against whom the estoppel is claimed benefited. No estoppel arises where the positions taken are necessarily antagonistic or where the conduct relied on to create the estoppel was superinduced by the acts of the party invoking the doctrine. And in no event can the estoppel be extended beyond the natural and reasonable import of the acts or conduct relied on to create it. To sustain an estoppel in this case the defendant must affirmatively prove and point to facts to establish the above essential elements; if any are lacking, the defense fails. Estoppels are not favored by the law and will be disregarded unless clearly established. I am of the opinion that the facts in this case do not justify the application of the rule." (Italics supplied.)

In the case at bar, even if the petitioner had actually paid the $74,648.39 in cash on April 10, 1923, that would be a recoverable "overpayment" under Section 607 of the Act of 1928 (26 U. S. C. A. § 2607). We think that neither in equity, in fact, or in law could a taxpayer be in a weaker position by reason of a claim for credit filed after the statute of limitations had run than he would be if he had made an actual payment of the tax in cash after the statute had run.

It is respectfully submitted therefore that the petitioner is not precluded from recovery under the doctrine of equitable estoppel by reason of the fact that its claim for refund of the 1918 overpayment, filed on April 10, 1923, also contained a claim for credit of a portion of the overpayment to supposed taxes for the years 1915, 1916 and 1917.

III.

THE PETITIONER HAS A GOOD CAUSE OF ACTION AGAINST THE DEFENDANT MALLEY AND THE SUIT WAS PROPERLY AND SEASONABLY BROUGHT.

As explained in the petition for certiorari the petitioner now concedes that it has no cause of action against the defendant Nichols. The only theory upon which the defendant Nichols could have been liable under the circumstances would have been for his "act" in making the wrongful credits which Section 609 of the Revenue Act of 1928 (26 U. S. C. A. § 2609; p. 41, *infra*) expressly declares to be *"void"*. By the weight of authority the effect of this section now is that the wrongful credits did not constitute a payment of the 1915, 1916 and 1917 taxes and did not result in a suable act on the part of the defendant Nichols.

In the petition for certiorari (pp. 20-21) explanation has also been made, as to the reason why the plaintiff in this case did not base its cause of action on the Certificate of Overassessment in a suit in the Court of Claims (*Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; 51 S. Ct. 395), as suggested in the opinion of the Circuit Court of Appeals (Rec. p. 68). It is obvious that in a suit against the United States, the Government could have relied upon the Commissioner's letter of December 17, 1929, or, in other words, could have contended that by that letter the Commissioner had rendered the Certificate of Overassessment *void;* instead of entirely disregarding that letter and contending that the Certificate of Overassessment is *valid*, in order to defeat the suit as here brought. In the light of all of the circumstances in the case at bar, therefore, the petitioner respectfully submits to this Honorable Court that its only reasonable and proper course of action was a suit against the Collector to whom the tax had been paid, relying upon the Commissioner's letter of December 17, 1929 as establishing the jurisdiction of the District Court, and that the suit was seasonably and properly brought against the defendant Malley for the following reasons:

1. The petitioner has a good cause of action against the defendant Malley for the recovery of the "overpayment of its 1918 taxes".

The petitioner respectfully submits that this suit was properly and seasonably brought against the defendant Malley within two years after the first and only disallowance of its timely claim for refund of the overpayment of its 1918 taxes, which was filed on April 10, 1923 in full compliance with Section 3226 of the United States Revised Statutes, as amended (41 Stat. 116; p. 41, *infra*). This statute provides:

> "No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, *unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.*" (Italics supplied.)

The tax in controversy was paid to the defendant Malley on or about September 17, 1919 (Rec. p. 54). The petitioner filed its claim for refund of the 1918 taxes on April 10, 1923, which was within four years of the date of payment as provided by Section 3228 of the Revised Statutes (45 Stat. 878; p. 42, *infra*). The claim was officially allowed on or about February 18, 1924, and was listed on the Schedule of Overassessments signed by the Commissioner of Internal Revenue on December 20, 1923 (Rec. p. 37). Thereafter the usual Certificate of Overassessment (Rec. p. 31) was issued to the petitioner on May 16, 1924 (Rec. p. 55). On January 31, 1924, the Collector of Internal Revenue prepared and signed the Schedule of Refunds and Credits whereon the $74,648.39 of the allowed overpayment for 1918 was credited and applied to the supposed deficiencies for the years 1915, 1916 and 1917 (Rec. p. 37). It is apparent that these credits were made more than five years from the dates upon which the returns for those years had been filed (Rec. p. 54), contrary to Section 250 (d) of the Revenue Act of 1921 (42 Stat. 264; p. 39, *infra*). On May 29, 1928, the Revenue Act of 1928

was enacted, Section 609 of which declares that any credits made after the period of limitation for the assessment and collection of taxes has expired are erroneous and "*void*" (p. 40, *infra*).

On July 27, 1929, the petitioner filed a claim on Form 843, for the refund of that portion of the 1918 overpayment ($74,648.39) which had been credited to the earlier years. With that claim it also filed a petition based solely on the contention that the credits were erroneous and void under Section 250 (d) of the Revenue Act of 1921, by virtue of Section 609 of the Act of 1928 (Rec. pp. 39–44). On December 17, 1929, the Commissioner of Internal Revenue, for the first time, refused to refund the $74,648.39. The ground of this refusal was not that the credits were valid and proper, but that there had been no overpayment of the 1918 taxes (Rec. p. 46). This letter of disallowance, states as follows:

> "The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and Appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918)."
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> . . . . . .
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> "It is accordingly held that the overassessment was erroneously allowed and, therefore, that portion of the overassessment which had not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner."

As further evidence that this action of the Commissioner of Internal Revenue on December 17, 1929, was in fact and in law a disallowance of the claim of April 10, 1923, the attention of the Court is invited to the very notes made in the Commissioner's office in 1929, which appear on the face of the same Certificate of Overassessment (Rec. p. 31) by which the claim of April 10, 1923 had originally been allowed. These notations are as follows:

> "$74,648.39 credited to barred taxes to be refunded Sec.

609 Act 1928 Memo to A & C 9/28/29 JJ This action cancelled by G. C. See memo dated 12/9/29. Refund not allowable JJ 2/24/30 attached."

It is thus obvious that the original administrative files were examined and that the Commissioner's letter of December 17, 1929 issued as a result of a reconsideration of the petitioner's claim of April 10, 1923.

Even if the Circuit Court of Appeals was right in holding that the letter of December 17, 1929 was a denial of the claim of July 27, 1929, that letter was still the first and only disallowance of that part of the claim of April 10, 1923 to which this suit relates as provided in Section 3226 of the United States Revised Statutes.

To reason from another point of view: The claim for refund of April 10, 1923 related to a sum of money ($107,826.61) which at that time occupied, on the books of the collector, the status of 1918 taxes. On the other hand, the claim for refund of July 27, 1929 related to a sum of money ($74,648.39) which was a portion of the original $107,826.61, but which in 1929 occupied the status of 1915, 1916 and 1917 taxes on the books of the collector.

From the standpoint of the respective accounts, therefore, as they stood at the time the claims were filed, the Commissioner's letter of December 17, 1929 was a disallowance of the right asserted in the claim of April 10, 1923, and never before denied, to a refund of 1918 taxes. If this reasoning is sound the letter of December 17, 1929 could not, either in fact or in law, be a disallowance of the claim of July 27, 1929.

It is respectfully submitted that the "*disallowance*" contemplated by the statute is not merely a rejection of a particular claim form or the physical claim itself, but that the statute contemplates a disallowance of the essence or the substance of the taxpayer's assertion of its right to the refund.

United States v. *Memphis Oil Company* (unreported) S. Ct. No. 308, October Term, 1932, decided January 9. 1933.

In the above case the asserted right to a refund seasonably made and a claim form filed out of time giving further specifications, were held "*not a double claim, but a claim single and*

indivisible". Mr. Justice Cardozo who delivered the opinion of the Court said:

> " The respondent filed a claim for taxes overpaid, a claim for money had and received to his use by the agents of the government.
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> . . . . . .
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> The function of the statute like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, *what is before him is not a double claim, but a claim single and indivisible, the new indissolubility welded into the structure of the old."* (Italics ours.)

Therefore, the Circuit Court of Appeals erred in refusing to hold that the letter of December 17, 1929 was, in its legal effect, a disallowance of the claim of April 10, 1923.

As to the time for suit: There is nothing in the law which sets a time limit within which the Commissioner of Internal Revenue must act on a timely claim for refund. If he does not act, of course, the taxpayer must bring his suit within five years of the date of payment. If, however, the Commissioner does actually disallow the claim, we think the statute permits the bringing of a suit within two years after the actual disallowance, whether or not such disallowance takes place before or after the expiration of the five year period.

United States v. *Michel*, 282 U. S. 656; 51 S. Ct. 284.

In the above case, Mr. Justice Butler, who delivered the opinion of the Court, quoted Section 3226 and said:

> " By this statute the United States waived its sovereign immunity from suit. The permission to sue is conditioned on the filing of a claim and the lapse of six months or the disallowance of the claim within that period, and is limited

to not more than five years after payment of the tax, unless the claim has been disallowed and the action is commenced within two years from the disallowance."

. . . . . .

"By the terms of the statute the period within which the Government consented to be sued commenced at the expiration of such six months and continued uninterruptedly through the five-year period following the date of payment *and until 'two years after the disallowance'.*" (Italics supplied.)

Under the language of the statute and the numerous interpretations thereof in cases decided by this Court, the petitioner respectfully submits that this suit was brought in time against the defendant Malley for the recovery of the overpayment of its 1918 taxes as alleged in Count I of the plaintiff's declaration (Rec. pp. 3–8).

2. The petitioner has a good cause of action against the defendant Malley for money had and received.

As a second form of action this suit was brought against the defendant Malley on the theory of money had and received, as alleged in Count II of the declaration (Rec. p. 8), of which the Certificate of Overassessment might or might not prove to be sufficient evidence. Since the defendant admitted in open court that the Certificate of Overassessment was a valid document and that the overpayment evidenced thereby had been credited to taxes for the earlier years after the statute had run, it is respectfully submitted that, upon this record, the petitioner fully sustained the burden of proving its right to recover under Count II of the declaration.

There is nothing in any statute or any decided case to the effect that a taxpayer is precluded from suing a Collector of Internal Revenue to whom either *the tax* or *the money* was actually paid, even though the Commissioner has issued a valid Certificate of Overassessment. Whether a Certificate of Overassessment has issued or not, the suit for money had and received is still a case arising "under a law providing for internal revenue" as provided in Section 629 of the United States Revised Statutes (p. 41, *infra*).

Downes v. *Bidwell*, 182 U. S. 244; 21 S. Ct. 770;
Klump v. *Thomas* (C. C. A. 7th), 162 Fed. 853, 856;
Bonwit Teller & Company v. *United States*, 283 U. S. 258; 51 S. Ct. 395;
Lewis et al. v. *Reynolds*, 284 U. S. 281; 52 S. Ct. 145.

Section 629 of the Revised Statutes (28 U. S. C. A. 41 (5)), as amended, provides:

> "The District Courts shall have original jurisdiction as follows:
>
> . . . . . .
>
> Fifth. Of all cases *arising under any law providing for Internal Revenue*, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals (R. S. § 563, par. 7, § 629, par. 4; Mar. 3, 1911, c. 231, § 24, par. 6, 36 Stat. 1092)." (Italics supplied.)

The case of *Downes* v. *Bidwell*, *supra*, holds that suit can be maintained, under the foregoing statute "against a collecting officer":

> "On account of any act done under color of his office, or of any such revenue law, or on account of any right, title, or authority claimed by such officer or other person under any such law."

While the *Bonwit Teller case*, *supra*, was brought against the United States and based upon the Certificate of Overassessment, there is nothing in that opinion to indicate that the same suit might not have been brought against the Collector for "money had and received" as *evidenced by* the Certificate of Overassessment.

There is nothing in any of the cases above cited which indicates that a collector may not be sued for money had and received, because the Commissioner has issued a Certificate of Overassessment evidencing the overpayment. Among the cases which present some slight indication that such a suit might be limited to an action in the Court of Claims is the case of *United States* v. *Real Estate Savings Bank*, 104 U. S. 728, 734. In

that case, however, the circumstances were entirely different from those in the case at bar. That decision itself clearly implies that if the Certificate of Overassessment has been "impeached for fraud or mistake" a suit against the United States could not be maintained on the "account stated" theory. In that case the Commissioner had not impeached or repudiated the allowance as the Commissioner's letter of December 17, 1929 does in the case at bar.

In the *Lewis* v. *Reynolds case, supra*, which is a suit against a collector and one of the latest decisions of this Court on the question of whether or not a suit would lie against a collector for money had and received, the Court, after reviewing the statutes, held that if the taxpayer could show that he had overpaid his tax a cause of action would lie against the collector to whom such tax was paid. Mr. Justice McReynolds, who delivered the opinion in the case, quoted with approval the language of the Circuit Court of Appeals for the Tenth Circuit where the Court said:

> "The action to recover on a claim for refund is in the nature of an action for money had and received and it is encumbent upon the claimant to show that the United States has money which belongs to him."

The petitioner respectfully submits, therefore, that it has a good cause of action against the defendant Malley under Count II of its declaration for money had and received as well as under Count I for 1918 taxes wrongfully and erroneously collected.

3. The Government's objections (1) that the suit was not seasonably brought and (2) that the District Court did not have jursidiction are untenable.

The only substantial objections which the Government raises against the petitioner's recovery are (1) that the suit is barred by the statute of limitations and (2) that the District Court did not have jurisdiction.

(1) As to the Statutes of Limitations the petitioner respectfully submits the following:

The claim for refund of April 10, 1923 was filed within four years of the date of payment of the 1918 taxes, or, of the

$74,648.39 as "money had and received" (*United States* v. *Memphis Oil Company, supra*), as provided in Section 3228 of the United States Revised Statutes (p. 42, *infra*); was never disallowed until December 17, 1929; and the suit was brought by a writ dated January 25, 1930 or within two years of the disallowance of that part ($74,648.39) of the claim of April 10, 1923, to which this suit or proceeding relates, as provided in Section 3226 of the United States Revised Statutes (p. 41, *infra*).

The suit was actually brought on January 25, 1930, or within six years of the issuance of the Certificate of Overassessment to the petitioner on May 16, 1924 (*Bonwit Teller & Company, supra;* 28 U. S. C. A. 41 (20); Judicial Code, Section 24, amended) so that if the Certificate of Overassessment was in fact valid, as the Government admitted it to be at the trial (Rec. p. 16), the plaintiff had a good cause of action against the United States and could have brought its action in that form, if the Commissioner had not "impeached" the Certificate of Overassessment and his previous allowance of the claim of April 10, 1923, by his letter of December 17, 1929 (Rec. p. 50).

The suit is not barred in the sense that a refund or a recovery of the $74,648.39 in the instant case would be *erroneous*, under Section 608 of the Revenue Act of 1928 (26 U. S. C. A. § 2608), which provides as follows:

> "Sec. 608. *Effect of Expiration of Period of Limitation Against Taxpayer.*
>
> A refund of any portion of an internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—
>
> . . . . . .
>
> (b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—
>
> (1) within such period suit was begun by the taxpayer, or . . . "

It was the obvious purpose and intent of Congress by the provisions of Section 607 and Section 609 (p. 40, *infra*,) of the Revenue Act of 1928 to enlarge or extend the period of recovery

in cases of this kind where a cash payment or a collection by way of credit had been made after the period of limitations applicable thereto; otherwise it would have been entirely unnecessary for Congress to have provided therein that both sections shall be applicable whether the payment or the credit was made *"before or after the enactment of this Act"*. See comments:

House Report No. 2, 70th Congress, 1st Session, pp. 33-34.

Senate Report No. 960, 70th Congress, 1st Session, pp. 17-18.

It is respectfully submitted that the suit is not barred by any statute of limitations.

(2) As to the Jurisdictional objection of the Government:

The petitioner accepted the Commissioner's letter of December 17, 1929 in good faith for what it purports to be,—*a denial of the fact that the petitioner had made an overpayment of its 1918 taxes.* The petitioner was taken completely by surprise when the Government came into the District Court and admitted the fact of the overpayment and contended that the Certificate of Overassessment and the other documents were valid, and rested its defense solely on the ground that the District Court did not have jurisdiction.

Whether the case at bar be considered as based on a disallowed claim for refund, under Count I of the declaration, or as a common law action for money had and received, under Count II of the declaration, it is respectfully submitted that the District Court had jurisdiction.

In this connection the attention of this Honorable Court is again called to the fact that the suit was brought within six years after the Certificate of Overassessment had been issued to the petitioner. In other words, the contention of Government counsel that the suit was brought on *an allowed claim* was in itself an admission that in a suit in the Court of Claims as in the case of Bonwit Teller & Company, *supra*, the Government would have had no defense. This suit would have been grounded upon the Certificate of Overassessment if the Commissioner of Internal Revenue had not misled the petitioner into believing that he had *"impeached"* his previous allowance by the letter of December 17, 1929 (Rec. pp. 49–50).

In both Courts below the Government rested its jurisdictional objection upon the authority of *United States* v. *Savings Bank*, 104 U. S. 728, in which Mr. Chief Justice Waite said:

> "A rejected claim may be prosecuted against the collector, and an allowed claim, not paid, may be sued for in the Court of Claims. To say the least, the decision of the Commissioner on the appeal is sufficient to determine whether one form of remedy shall be resorted to by the claimant, or the other."

In the opinion in the Savings Bank case, Mr. Chief Justice Waite, after referring to the case of *United States* v. *Kaufman*, 96 U. S. 567, and Section 3228 of the United States Revised Statutes, also said:

> "And we held that the allowance of a claim by the Commissioner under this section, was equivalent to an account stated between private parties and binding on the United States, until in some appropriate form it was impeached for fraud or mistake, . . ."

It is obvious, therefore, that if the plaintiff had grounded its suit upon the previous allowance of the claim, as counsel below argued it should have done, then the Government would undoubtedly have reversed the grounds of its jurisdictional objection, cited the same case as authority and contended that the suit was improperly brought because the allowance of the claim had been "*impeached for mistake*" by the letter of December 17, 1929 (Rec. p. 50). As a matter of fact, the Circuit Court of Appeals actually held that the Commissioner redetermined the taxes in 1929 and found no overassessment, or, in other words, that the Commissioner had impeached his previous allowance. The opinion of the District Court on the other hand rests entirely on the fact that the Commissioner's letter of December 17, 1929 is not an impeachment of the previous allowance.

It has always been the spirit of this Honorable Court and other courts to disregard as far as possible an objection to the form of the remedy and to give greater weight to the substantial rights and equities involved.

Howbert v. *Penrose*, 38 Fed. 577, 581.
United States v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; 35 S. Ct. 499.

In the case of *Howbert* v. *Penrose*, 38 Fed. (2) 577, 581, the Circuit Court of Appeals for the Tenth Circuit, McDermott Circuit Judge, said:

> "The defendant concedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc. R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, 56, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is that substance should be given the right of way over form.*" (Italics supplied.)

In the case *United States* v. *Emery, Bird Thayer Realty Co.*, *supra*, the Government raised the jurisdictional question. Mr. Justice Holmes of this Court overruled the objection in the following language:

> "The objection to the jurisdiction pressed by the government is that the only remedy is a suit against the collector. As the United States has received and keeps the money, and would indemnify the collector if he had to pay (Rev. Stat. § 3220, Comp. Stat. 1913, § 5944), the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission and refund of internal revenue taxes, so far as applicable,' etc., are extended to this tax (§ 38, 36 Stat. at L. 117, chap. 6), but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the collector for an unjustified collection was given by the common law. The jurisdiction over suits against the United States under § 24 of the Judicial Code extends to 'all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress.' However gradually the

result may have been approached in the earlier cases it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, § 24, first) and those 'founded upon' (id. § 24, twentieth) a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye. *Dooley* v. *United States*, 182 U. S. 222, 228, . . .

. . . . . .

Being of opinion that the district court had jurisdiction, we pass to the merits."

CONCLUSION.

The petitioner respectfully submits to this Honorable Court:

I. That upon this record the plaintiff fully sustained the burden of proving that it actually made an overpayment of its taxes for the six months period ended June 30, 1918.

II. That the plaintiff is not precluded from recovery by reason of the fact that its claim for refund of April 10, 1923 requested that a portion of the asserted overpayment should be credited to taxes for the years 1915, 1916 and 1917.

III. That the plaintiff, petitioner herein, has a good cause of action against the defendant Malley, and the suit was properly and seasonably brought.

IV. That the decision of the Circuit Court of Appeals is erroneous, should be reversed, and that judgment should be ordered for the plaintiff in the amount of $74,648.39 together with interest.

Respectfully submitted,

O. WALKER TAYLOR,
Attorney for Petitioner.

APPENDIX.

STATUTES INVOLVED.

Revenue Act of 1918:

Section 212 (b); 40 Stat. p. 1064:

"(b) The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 200 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 226."

Section 205 (a) 40 Stat. p. 1061:

"Section 205 (a). That if a taxpayer makes return for a fiscal year beginning in 1917, and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title 1 of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title 1 of the Revenue Act of 1917, which the portion of said period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period

computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. . . ."

Section 226, 40 Stat. p. 1075:

"Sec. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is from one fiscal year to another fiscal year a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year he shall make a separate return for the period between the beginning of the calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the credits provided in subdivision (c) and (d) of section 216 shall be reduced respectively to amounts which bear the same ratio to the full credits provided in such subdivisions as the number of months in such period bears to twelve months."

Revenue Act of 1921:

Section 250 (d), 42 Stat. p. 265:

"(d) The amount of income, excess-profits, or war profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four

years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes', approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed. . . ."

Section 1313, 42 Stat. p. 313:

"Administrative Review."

"Sec. 1313. That in absence of fraud or mistate in mathematical calculation, the findings of fact in and the decision of the Commissioner upon (or in case the Secretary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not be subject to review by any other administrative officer, employee, or agent of the United States."

Revenue Act of 1928:

Section 607; 26 U. S. C. A. § 2607:

"Sec. 607. Effect of expiration of period of limitation against United States: Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 609; 26 U. S. C. A. § 2609:

"Sec. 609. *Erroneous Credits.*

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act."

United States Revised Statutes:

Section 629; 28 U. S. C. A. 41 (5):

"The District Courts shall have original jurisdiction as follows:

. . . . . .

Fifth. Of all cases *arising under any law providing for Internal Revenue*, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. § 563, par. 5, § 629, par. 4; Mar. 3, 1911, c. 231, § 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

Section 3226, as amended; 26 U. S. C. A. 156:

"Section 3226 as amended; U. S. Code, Title 26, Section 156:

"156. *Suits for Recovery of taxes wrongfully collected.* No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal

Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

" (b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924."

Section 3228, as amended; 26 U. S. C. A. 157:

" Section 3228 as amended:

"157. *Claims for refundments; limitations.* (a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided by law in the case of income, war-profits, excess-profits, estate and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum."

" (b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed."